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In The Supreme Court Of The United States

OCTOBER TERM 1997

WILLIS HOPE WHITE,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Fourth Circuit Court of Appeals has decided that an individual who has whole life insurance coverage under an ERISA group life insurance policy, and who also seeks to enforce his rights to coverage under a related (conversion) individual life insurance policy is *not* entitled to coverage under both policies, despite the individual's faithful payment of premiums in accordance with the individual life contract and an incontestability clause in both the group and individual contracts.

Is the Fourth Circuit's decision in this case so contrary to the rationale of the rulings of other U.S. Courts of Appeal, and so violative of the rules of ERISA and federal common law that this Court should exercise its power of supervision and reverse the Fourth Circuit?

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In The
Supreme Court of the United States

_____ Term 1997

WILLIS HOPE WHITE

Petitioner,

V.

PROVIDENT LIFE AND ACCIDENT CASUALTY COMPANY,

Respondent,

Petition for Writ of Certiorari to the
Supreme Court of the United States
Fourth Circuit Court of Appeals

Willis Hope White respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in the case identified below.

OPINIONS BELOW

The May 19, 1997 opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, *infra*, pp. 10-16. That opinion affirmed the decision of the United States District Court for the Middle District of North Carolina, Salisbury Division, which is also set out in the Appendix, *infra*, 17-25.

JURISDICTION

The Petitioner (Plaintiff) originally filed suit against the Respondent (Defendant) in this case in the Superior Court of Rowan County, North Carolina. The Petitioner's case was removed to federal court on the grounds that the Petitioner's claims involved the Employee Retirement Income Security Act ("ERISA"). The District Court had jurisdiction to hear the underlying case pursuant to 28 U.S.C. § 1331 (federal question). The Fourth Circuit Court of Appeals exercised appellate jurisdiction pursuant to 28 U.S.C. § 1291. As stated above, the Fourth Circuit Court of Appeals affirmed the decision of the U.S. District Court on May 19, 1997. White seeks this Court's review of the Fourth Circuit's decision pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the United States Supreme Court.

STATEMENT OF THE CASE

A. Material Facts

Willis Hope White ("White") is a fifty-one year old individual who was employed by White Packing Company from on or about June 30, 1965 to June of 1984. Through his employer, White was insured with a whole life insurance policy in the face amount of $34,000, issued to him by the respondent. (J. A. 106). While in the employ of White Packing Company, White became totally disabled due to chronic renal failure, and he ceased his employment. (J. A. 10, 33) When this event occurred, White became entitled to continuous coverage under the whole life policy with a waiver by Provident of all future premiums. (J.A. 33). White's coverage under the continuation of the benefits provisions of the whole life policy remains in effect. (J. A. 10, 125).

On or about August 1, 1984, White was issued a separate individual life insurance policy by the Respondent, with a face amount of insurance of $34,000, requiring annual premium payments of $609.66. (J.A. 161, 168). White made the annual premium payments for a period of approximately four years, during which time the Respondent never advised White that he was not entitled to have the individual policy. (J. A. 35, 11, 19).

During the summer of 1988, the Respondent discovered that it had mistakenly issued the individual life policy to White, and as a result advised White that he would not have coverage thereunder and that he would have to return the policy. (J. A. 19, 35). White's group policy contained certain language which, according to the Respondent, prohibited White from having coverage under both policies. (J. A. 125, 126, 107, 124). The Respondent has tendered a refund of White's premiums, but White has refused to present the Respondent's check for payment. (J. A. 33).

Both the group and individual life insurance policies issued to White by the Respondent also contain "incontestability" clauses which provide that White's coverage under the policies shall be incontestable, except for non-payment of premiums, after the policies had been in force for two years. (J. A. 152, 170).

B. Course of Proceedings and Disposition of the Case Below

White filed suit in the Superior Court of Rowan County, North Carolina, against the Respondent seeking a declaration that he was entitled to coverage under both the group life insurance policy and the individual life insurance policy issued to him by the Respondent (J. A. 9-15).

White's case was removed to federal court pursuant to 28 U.S.C. § 1441. Both White and the Respondent filed motions for summary judgment, and the United States District Court for the Middle District of North Carolina entered a Judgment and Memorandum Opinion (Appendix, *infra*, pp. 17, 18).

White appealed from the Judgment of the District Court to the Fourth Circuit Court of Appeals (Appendix, *infra*, p. 10). The Fourth Circuit exercised jurisdiction over this case pursuant to 28 U.S.C. § 1291. On May 19, 1997, the Fourth Circuit Court of Appeals affirmed the judgment of the District Court. (*infra*, p. 16). White petitions this Court for a review of the decision of the Fourth Circuit.

ARGUMENT

The Fourth Circuit Court of Appeals has failed to give proper consideration to *all* of the express terms of White's ERISA related life insurance policies, and this failure has resulted in a decision which is so inconsistent and incorrect so as to require that this Court correct the decision. The Fourth Circuit Court of Appeals has failed to address the clear ambiguity in the insurance contracts and to adopt the correct construction of the same.

The ambiguity in White's life insurance contracts (which were drafted by the Respondent) is obvious, since these contracts contain competing language which may be cited to advance both White's and the Respondent's arguments. (J. A. 154, 170, 125, 161, 108). The Fourth Circuit has decided that those provisions which are favorable to the Respondent "trump" those which are favorable to White, but in such a determination, the Fourth Circuit completely ignores the well established rules of contract construction which require ambiguities to be construed against the drafter (the Respondent in this case).

Indeed, the Fourth Circuit recites that: "The written terms of this ERISA plan plainly prohibit simultaneous recovery under the group policy and a conversion policy, and *ERISA demands adherence to the clear language of this employee benefit plan (emphasis added)*. *See* U.S.C. §§ 1102(a)(1) & 1102(b)(3)". (Appendix, *infra* 14.). In accordance with the express ERISA language cited by the Fourth Circuit, the incontestability clauses contained in the ERISA plan(s) should be followed and enforced, just as are other particular clauses relied upon by the Respondent and the Fourth Circuit in its ruling.

When such obvious competition exists between various clauses in these insurance contracts, ambiguity and uncertainty must exist. When language in an ERISA Plan is reasonably susceptible to two interpretations, such language is ambiguous. *Smith v ABS Industries.*, 890 F.2d 841,846-847 (6th Cir.1989), *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994). In resolving the ambiguity, the Fourth Circuit should have, under federal common law, incorporated traditional methods and presumptions of contract construction. *Rakoczy v. Traveler's Insurance Co.*, 959 F. Supp 777 (E.D. Michigan 1997) n 4. If it had done so, , the Fourth Circuit would have had no alternative but to construe the ambiguity in the contract(s) against the drafter, the Respondent, and in favor of White. *See 60A Am Jur 2d, § 121*, citing *Wells v. The Hanover Ins. Co.*, (DC Mass) No. 83-0131-F, 10/16/85, stating, in pertinent part:

> .....another court has ruled that ERISA did not preempt a claim based on state common law of contract alleging that, to the extent that a pension plan contained ambiguous language, it should

> be interpreted against its drafter. If ERISA did preempt state law in this instance, the plan would have to be construed in accordance with federal contract law.

60A Am Jur 2d, § 121, p. 142

The Fourth Circuit's failure to properly and adequately consider the ambiguity in the insurance contracts drafted by the Respondent, and its failure to resolve the conflict between the incontestability and eligibility clauses in the contracts in favor of White are in direct contrast to the well reasoned rationale used by the Seventh Circuit Court of Appeals.

In a series of cases, the Seventh Circuit Court of Appeals has ruled that: (a) federal common law rules of contract interpretation applied to determine the meaning of terms of ERISA insurance policies, and (b) under these federal common law rules governing contract interpretation, contracts must be construed in an ordinary and popular sense as would a person of average intelligence and experience, and ambiguous terms in insurance contracts must be construed in favor of the insured. *See Pitcher v Principal Mutual Life Ins. Co.*, 93 F3d. 407 (7th Cir. 1996), *Brewer v. Protexall*, Inc., 50 F 3d. (7th Cir. 1995), *Meredith vs., Allstell Inc.*, 11 F3d. 1354, 1358 (7th Cir. 1993).

The Fourth Circuit's ruling is inconsistent with the rationale of the Seventh Circuit. In the case at bar, the Fourth Circuit has stated that White's contention concerning the effect of the incontestability clauses "misses the point" (Appendix, *infra*, p. 14.). The Fourth Circuit describes the issue in this case as "not whether the group policy is valid, but whether it forbids a double recovery." (*infra*, p. 14.). In

essence, the Fourth Circuit's ruling has the effect of allowing the Respondent to, after the fact, exclude its insured White from the protection he had been promised by the very terms and conditions of the Respondent's policies. In so doing, the Fourth Circuit has entered into a decision which guts the incontestability clauses of their meaning and violates the very purpose of this express language of the contracts.White respectfully argues that, contrary to the decision of the Fourth Circuit, the effect on the incontestability clauses on the *validity* of these life insurance contracts is exactly what this case is about. (*See* Fourth Circuit's statement, Appendix, *infra*, p. 14.) Given its reliance upon 29 U.S.C. §§ 1102(a)(1) & 1102(b)(3), it is irreconcilable that the Court should give full effect and meaning to those express portions of the insurance contract(s) which favor the Respondent, while giving no credence to those which White seeks to enforce.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals is in conflict with the rationale of decisions of the Seventh Circuit Court of Appeals. Further, the Fourth Circuit's failure to follow that rationale and to properly consider the express terms of White's ERISA related life insurance policies has resulted in a decision which is so inconsistent and incorrect so as to require that this Court use its supervisory capacity to correct the Fourth Circuit Court of Appeals. This Court should reverse the decision of the Fourth Circuit (Appendix, infra, pp. 10-16) and find in favor of the Petitioner White.

RESPECTFULLY
SUBMITTED

WILLIS HOPE WHITE

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIS HOPE WHITE,
Plaintiff-Appellant,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Defendant-Appellee.

No. 96-1695

Appeal from the United States District Court
for the Middle District of North Carolina, at Salisbury.
N. Carlton Tilley, Jr., District Judge.
(CA-91-485-4)

Argued: April 10, 1997

Decided: May 19, 1997

Before WILKINSON, Chief Judge, and HAMILTON and MOTZ, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Hamilton and Judge Motz joined.

COUNSEL

ARGUED: John Walter Fletcher, III, FLETCHER & RHOTON, P.A., Charlotte, North Carolina, for Appellant. William Pinkney Herbert Cary, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellee. **ON BRIEF:** Glenn E. Ketner, Jr., Salisbury, North Carolina, for Appel-

lant. John M. Cross, Jr., BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellee.

OPINION

WILKINSON, Chief Judge:

Willis White sued Provident Life and Accident Insurance Company, seeking a declaration that he was entitled to life insurance benefits under both a group policy and an individual conversion policy issued to White by Provident. The district court granted Provident summary judgment, and White appeals. Because the group policy and the right of conversion are governed by ERISA, and because their plain terms prohibit White from recovering life insurance benefits under a group policy and an individual conversion policy, we affirm the judgment of the district court.

I.

On October 26, 1981, Provident issued a Group Life Insurance Policy to the employees of White Packing Company. Willis White, an employee of the company, received $34,000 of coverage under the group policy. On October 31, 1981, White suffered chronic renal failure and, as a result, ceased working. Because of his total disability, White became entitled to continuous life coverage under the group policy with a waiver of premiums. This coverage remains in effect.

Under the terms of the group policy, a conversion policy was available to employees who no longer qualified for group coverage as a result of, for example, no longer being employed by the company. On July 16, 1984, White executed an "application for Conversion of Group Life Insurance to an Individual Life Insurance Policy" seeking to convert his coverage under the group policy to individual coverage. The group policy provides that an insured may not simultaneously sustain both group and individual coverage. White's application for a conversion policy identifies the $34,000 of coverage under the group policy as the "group life insurance terminated" in conjunction with the issuance of an individual policy.

On August 1, 1984, Provident mistakenly issued White an individual conversion policy. The face value and material terms of the policy were the same as that of the life coverage under the group policy. White tendered premiums for the conversion policy from the time the policy was issued until the summer of 1988.

In the summer of 1988, Provident discovered it had erroneously issued a conversion policy to White. Immediately after this discovery, on August 3, 1988, Provident notified White that he could not maintain simultaneous coverage under the group policy and the conversion policy. Provident told White that the individual policy had been issued by mistake and that it should be returned. Provident repaid all premiums previously paid by White under the individual conversion policy. White, however, refused to accept the repayment and refused to return the individual policy. Provident has accepted no further premium payments from White.

White filed suit in state court seeking a declaratory judgment that he was entitled to coverage under both the group and individual policies. Provident removed the case to federal court on the grounds that White's claims were preempted by ERISA. Both parties moved for summary judgment, and the district court granted summary judgment for Provident. White appeals.

II.

A.

White first contends that ERISA does not govern this case. White concedes that the group policy is an ERISA benefits plan. He argues, however, that the individual conversion policy constitutes a distinct contract between himself and Provident whose relation to the group policy is too tenuous and remote for ERISA to apply.

The majority of courts which have examined the issue of whether ERISA applies to conversion policies have found ERISA to be applicable. Those cases reason that the right of conversion is a benefit required by ERISA, *see* 29 U.S.C. §§ 1161 & 1162, and that the entire existence of a conversion policy rests on the conversion right found

in an ERISA plan. In a case analogous to the one at hand, for instance, the Ninth Circuit stated:

> The group plan in this case, which the [plaintiffs] admit is an ERISA plan, provides for the conversion benefit. Because the [plaintiffs] would not be eligible for a conversion policy without first belonging to the class of beneficiaries covered by the ERISA group plan, we conclude that the individual conversion benefits are part of the ERISA plan and are thus governed by ERISA.

Greany v. Western Farm Bureau Life Insurance, 973 F.2d 812, 817 (9th Cir. 1992). Similarly, the Eleventh Circuit has found that a converted policy is covered by ERISA because the "ability to obtain the converted life insurance policy arose from the ERISA plan, and the converted policy itself continued to be integrally linked with the ERISA plan." *Glass v. United of Omaha Life Insurance*, 33 F.3d 1341, 1347 (11th Cir. 1994); *see also Beal v. Jefferson-Pilot Life Insurance*, 798 F. Supp. 673, 675 (S.D. Ala. 1992); *Nechro v. Provident Life & Accident Insurance*, 795 F. Supp. 374, 378-80 (D.N.M. 1992); *Rasmussen v. Metropolitan Life Insurance*, 675 F. Supp. 1497, 1506 (W.D. La. 1987). Even the minority of courts which have found ERISA inapplicable to claims arising under the terms of conversion policies have agreed that ERISA applies to cases dealing with the right to convert. *See Vaughn v. Owen Steel Co.*, 871 F. Supp. 247, 249 (D.S.C. 1994); *Mimbs v. Commercial Life Insurance*, 818 F. Supp. 1556, 1561 (S.D. Ga. 1993).

We need not adopt one view or the other for purposes of this case, because even under the minority view, ERISA governs the right of conversion to an individual policy. Since White's claims are clearly related to the conditions placed by the group policy on the right of conversion, his claims must be governed by ERISA. It is clear that under this ERISA plan, a beneficiary may claim coverage under either the group policy or a conversion policy, but not both. The group policy states:

> If a converted policy is issued under the plan, it must be returned without claim before insurance will be continued

> under [the group policy]. Any premiums paid for the converted policy will be returned to you.

The group policy goes on to indicate that "the Insurance Company will pay to the beneficiary of record the amount of the Employee's life insurance . . . *less the amount of any individual policy issued in accordance with the conversion privilege and in force at death.*" (emphasis added). In addition to these prohibitions, the group policy adds that "nothing will be paid under the [conversion policy] if any amount is paid under the [group policy]."

The group policy thus allows an insured to obtain individual conversion coverage as an alternative, but not in addition to, group coverage. The written terms of this ERISA plan plainly prohibit simultaneous recovery under the group policy and a conversion policy, and ERISA demands adherence to the clear language of this employee benefit plan. *See* 29 U.S.C. §§ 1102(a)(1) & 1102(b)(3).

B.

White argues that Provident should not be allowed to apply the clear language of the ERISA plan because of an incontestability clause in that plan. That clause states that there "will be no contest of an Employee's coverage after it has been in force for two years from the date of coverage." White maintains that since he has been covered under the group policy since 1984, this clause acts to prohibit Provident from denying recovery under the group policy.

White's contention, however, misses the point. An incontestability clause prevents an insurer from contesting the validity of an insurance contract. However, such a clause certainly does not prevent the insurer from invoking the plain terms of an ERISA plan. The issue here is not whether the group policy is valid, but rather whether it forbids a double recovery. The ERISA plan plainly includes such a prohibition, and Provident was entitled to assert it.

C.

Provident accepted premiums from White on the individual conversion policy from 1984 through 1988. Upon the discovery of its mis-

take in 1988, Provident immediately attempted to repay these premiums. White refused to accept this repayment and now asserts that Provident's mistaken acceptance of premiums constituted a waiver of its right to deny a dual recovery. White, of course, cannot premise this waiver theory on state law. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). In *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), we specifically held that state law waiver and estoppel claims were preempted by ERISA, noting that such claims pose a risk of creating "conflicting employer obligations and variable standards of recovery." 772 F.2d at 1147. This is precisely the result that ERISA's broad preemption clause was enacted to avoid. *Id.*

Nor can White rely on the federal common law under ERISA, which does not incorporate the principles of waiver and estoppel. As we recently noted in *HealthSouth Rehabilitation Hospital v. American National Red Cross*, 101 F.3d 1005 (4th Cir. 1996), "ERISA simply does not recognize the validity of oral or non-conforming written modifications to ERISA plans." *Id.* at 1010. In this case, White cannot even point to any explicit assurances by Provident that he was entitled to double coverage. Rather, he would have us hold that Provident's mistaken acceptance of premiums constituted a knowing waiver of rights that is in direct conflict with the plain written terms of an ERISA plan. ERISA, however, does not provide for such unwritten modifications of ERISA plans. *See* 29 U.S.C. § 1102(a)(1) (requiring that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument"); 29 U.S.C. § 1102(b)(3) (requiring that an ERISA plan describe the formal procedures by which the plan may be amended). Therefore, White's waiver argument cannot prevail.

III.

We note in conclusion that White may prove to be his own worst enemy in this case. Even if White were able to convert to an individual policy, the net result would be that he would pay premiums for coverage to which he is entitled under the group policy for free. Fortunately for White, the insurer in this case sought only the return of a conversion policy as provided for in the ERISA plan. It is clearly

entitled to such a return, and we thus affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

WILLIS HOPE WHITE, Plaintiff,	)	
v.	)	4:91CV00485
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendant.	)	

JUDGMENT

For the reasons set forth in the contemporaneously filed Memorandum Opinion,

IT IS ORDERED that Defendant's Motion for Summary Enforcement of Settlement Agreement is DENIED;

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED, and

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

This the 22 day of April, 1996.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

WILLIS HOPE WHITE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	4:91CV00485
	)	
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

TILLEY, District Judge.

Defendant Provident Life and Accident Insurance Company ("Provident") has filed a Motion for Summary Enforcement of Settlement Agreement. In addition, Provident and Plaintiff Willis Hope White ("White") have each filed motions seeking judgment as a matter of law. For the reasons set forth below, Provident's Motion for Summary Enforcement of Settlement Agreement is DENIED, White's Motion for Summary Judgment is DENIED, and Provident's Motion for Summary Judgment is GRANTED.

I.

On October 26, 1981, Provident issued Group Life Insurance Policy Number J-364 (the "Group Policy") to the employees of White Packing Company (the "Company") in Salisbury, North Carolina. At that time. White was an employee of the Company and received $34,000 of coverage

under the Group Policy. Around October 31, 1981, White ceased full time work at the Company when he suffered chronic renal failure and became totally disabled. Because of this disability, White became entitled to continuous coverage under the Group Policy with a waiver of premiums. This continued coverage under the Group Policy remains in effect.

On July 16, 1984, White executed an "Application for Conversion of Group Life Insurance to an Individual Life Insurance Policy" seeking to convert his life coverage under the Group Policy to individual life coverage. Under the provisions of the Group Policy, a "conversion" policy is available where an employee is no longer eligible for group coverage, either because his employment is terminated or because he is no longer a member of the class eligible for coverage. The Group Policy also provides that an insured may not simultaneously sustain both group and individual coverage. White's application for a conversion policy identifies the $34,000 of coverage under the Group Policy as the "group life insurance terminated" in conjunction with the issuance of an individual conversion policy.

Provident mistakenly issued an individual Conversion Policy (#1236168-B) ("Individual Policy") on August 1, 1984. The value of the Individual Policy is $34,000. In fact, White was not eligible for a conversion policy since he remained eligible for and received coverage under the Group Policy. From the time Provident issued the Individual Policy until the summer of 1988, when Provident became aware of its mistake, White tendered premium payments for the Individual Policy. On August 3, 1988, Provident notified White of its mistake and that he was not entitled to maintain simultaneous coverage under both the Group and Individual Policies. Provident requested that White return the Individual Policy and sought to repay all premium payments submitted by White for the Individual Policy. White refused to return

the Individual Policy and refused to accept repayment of the premiums. Provident has refused to accept further premium payments for the Individual Policy.

After White filed a Complaint in state court seeking a declaratory judgment that he was entitled to coverage under both the Group and Individual Policies, Provident removed the case to this Court on the grounds that White's claim is preempted by ERISA. White did not move to remand the case to state court. On January 9, 1995, this Court held a hearing on the parties' motions for summary judgment. When the Court indicated that White was not entitled to coverage under both policies, the parties began settlement discussions. After approximately tow hours of discussions outside the courtroom, the parties returned and stated that they had reached a settlement agreement. When the Court inquired of White whether his attorney's statements regarding the settlement agreement were accurate, White responded "Yes, sir". Nevertheless, White thereafter refused to sign the settlement agreement.

On May 30, 1995, when no settlement agreement had been filed, a status conference was held in which Provident sought summary enforcement of the settlement agreement. White opposed this Motion and asked the Court to rule on the parties' summary judgment motions. When the Court explained to White that Provident might prevail on its Motion for Summary Judgment and that he would then lose the money Provident had offered to settle the case, White maintained his desire to have the Court rule on the summary judgment motions.

II.

Provident has filed a Motion for Summary Enforcement of Settlement Agreement, arguing that an enforceable settlement agreement was reached by the parties

on January 9, 1995 which may be summarily enforced by the Court. A district court may not summarily enforce a settlement agreement when there is a material dispute about the existence of a settlement agreement. See Petty v. Timken Corp., 849 F.2d 130, 132 (4th Cir. 1988); Milner v. Norfolk & W.R. Co., 643 F.2d 1005, 1009 (4th Cir. 1981). In response to Provident's Motion, White has submitted an affidavit in which he states that because of his condition as a kidney dialysis patient, he was experiencing lightheadedness and was unable to concentrate and think clearly at the January 9, 1995 hearing. White states that he understood that the parties had agreed to suspend settlement discussions, but did not reach a settlement agreement. White Aff'd. at ¶¶ 5-7. Accepting White's sworn statement, there is a material dispute about the existence of a settlement agreement in this case. Provident's Motion for Summary Enforcement of Settlement Agreement is, therefore, DENIED.

III.

In addition to Provident's Motion for Summary Enforcement of Settlement Agreement, both parties have filed summary judgment motions. Summary judgment is proper only if there is no genuine issue as to any material fact. The moving party on a motion for summary judgment will have the burden of pointing to deficiencies in the record as to matters upon which the opposing party has the burden of proof such that the opposing party cannot prove its claim or defense or showing otherwise why, upon the undisputed facts in the record, the moving party is entitled to judgment as a matter of law. The party opposing the motion for summary judgment may not merely rest on its pleadings, but must provide evidence or point to evidence already in the record, properly authenticated pursuant to Rule 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Orsi v. Kirkwood, 999 F.2d 86 (4th Cir. 1993); Herold v. Hajoca

Corp., 864 F.2d 317 (4th Cir. 1988), cert. denied, 490 U.S. 1107 (1989).

In this case, there are no genuine issues as to any material facts. The only substantive dispute between the parties is whether White is entitled to simultaneous coverage under both the Group and Individual Policies. Resolution of this question requires analysis of three questions: (1) whether ERISA applies to the Individual Policy; (2) whether the incontestability clause in the Individual Policy prohibits Provident's denial of coverage under that policy; and (3) whether Provident has waived any claim of invalidity of the Individual Policy.

A.

White concedes that ERISA governs the Group Policy. However, White argues that ERISA does not apply to the Individual Policy because it is not an "employee benefit plan". However, the two policies are integrally related. White's opportunity to convert his group coverage to individual coverage is a benefit provided by the Group Policy. This conversion right is provided for by ERISA. See 29 U.S.C. §§1161-1162. White would not be entitled to conversion benefits unless he was an eligible insured beneficiary under the Group Policy, which White admits is an ERISA plan. Because White would not be eligible for a conversion policy without first being covered by the ERISA Group Policy, his individual conversion benefits, and the Individual Policy, are governed by ERISA. See Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1346-47 (11th Cir. 1994); Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 816-17 (9th Cir. 1992).

B.

White next contends that the Individual Policy is enforceable under an incontestability clause in the policy

providing that the policy is incontestable after it has been in force, during the lifetime of the insured, two years from its date of issue. White argues that because Provident accepted his premium payments until 1988, approximately four years after he received the Individual Policy, the incontestability clause bars Provident from raising objections to the validity of the Individual Policy.

Whether this is the case, it does not establish that White is entitled to simultaneous coverage under both the Group and Individual Policies. The "Coverage Provisions" section of the Group Policy provides:

> If a converted policy is issued under the Plan, it must be returned
>
> without claim [illegible]fore insurance will be continued under this provision.
>
> Any premiums paid for the converted policy will be returned to you.

Provident Group Policy J-364 at 11. Thus, if White receives benefits under the Individual Policy, he may not receive benefits under the Group Policy. The incontestability clause in the Individual Policy does not establish that White is entitled to simultaneous coverage under both the Individual Policy and the Group Policy.

C.

Finally, White argues that Provident has waived any right to require the return of the Individual Policy by its acceptance of his premium payments. Federal courts have disagreed over whether the common law principle of waiver applies under ERISA. However, even assuming that the principle does apply, White has not presented sufficient evidence to maintain his argument.

Waiver is the voluntary relinquishment of a known right. Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1347 (11th Cir. 1994). In Glass, the Eleventh Circuit held that where the defendant insurance company notified the plaintiff that his individual conversion policy had been mistakenly issued soon after it had discovered the mistake, it had not waived the eligibility requirements of the plan, even though it had accepted premium payments from the plaintiff until its discovery of the mistake. Id. at 1348-49. The Glass Court reasoned that because of the insurance company's notice to the insured of the mistake soon after its discovery, there was no evidence that the insurance company had attempted to unjustly enrich itself at the expense of an ineligible plan participant or that it had voluntarily relinquished a known right. Id. at 1348.

The same reasoning applies to this case. Provident notified White of its mistake soon after its discovery and attempted to return White's premium payments made under the Individual Policy in exchange for the return of the policy. Since the discovery of the mistake, Provident has refused to accept White's premium payments. Provident has not sought to unjustly enrich itself at the expense of White, who was not entitled to the conversion policy under the terms of the Group Policy, nor have they voluntarily relinquished a known right. Consequently, Provident's acceptance of premium payments until its discovery of the mistake does not constitute a waiver of the eligibility requirements of the conversion policy.

D.

Both the Group and Individual Policies are ERISA employee welfare benefit plans. Under the terms of the Group Policy, White was not entitled to individual life coverage. Provident did not waive the eligibility requirements of the conversion policy by accepting White's premium payments until the discovery of the mistake. Under the terms

of the Group Policy and White's Application for Conversion of Group Life Insurance to an Individual Life Insurance Policy, White is not entitled to simultaneous coverage under both the Group and Individual Policies. White must therefore elect continuous coverage under the Group Policy with the waiver of premiums or coverage under the Individual Policy with the required premium payments.

IV.

Because there is a material dispute as to the existence of a settlement agreement in this case, Provident's Motion for Summary Enforcement of Settlement Agreement is DENIED. However, White is not entitled to simultaneous coverage under both the Group Policy and the Individual Policy. White's Motion for Summary Judgment is therefore DENIED, and Provident's Motion for Summary Judgment is GRANTED.

This the 22 day of April, 1997.

_____

United State District Judge

Statutes Cited:

28 U.S.C. § 1291

1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 U.S.C. §§ 1292(c), (d), 1295].

28 U.S.C. § 1292

1292. Interlocutory decisions

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the Court would have jurisdiction of an appeal under section 1295 of this title [28 USCS § 1295]; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an account.

28 U.S.C. § 1331

1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441

1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1254

1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1102(a)(1) and (b)(3)

1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written

instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(b) Requisite features of plan. Every employee benefit plan shall--

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and